

Message Text

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TO SECSTATE WASHDC PRIORITY 7761

C O N F I D E N T I A L SECTION 1 OF 2 GENEVA 0537

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DEPT PASS TO L/OES AND L/EUR FROM OXMAN

E.O. 11652: GDS

TAGS: PLOS

SUBJECT: LEGAL ADVISERS MEETING

1. THE FOLLOWING PARAGRAPHS CONTAIN MATERIAL ON LOS RELATED ITEMS FOR JAN 30 MEETING. THIS MATERIAL SHOULD BE AUGMENTED AS APPROPRIATE ON EACH ITEM. I WAS GUIDED IN PART BY FACT THE LOS ITEM APPEARS IN AGENDA UNDER "BILATERAL" HEADING, AND BY FACT THAT GENERAL REVIEW OF LOS COULD TAKE ALL DAY. ACCORDINGLY, I HAVE SELECTED THREE LOS CONFERENCE ISSUES THAT HAVE NOT RECEIVED ENOUGH ATTENTION IN US-CANADIAN TALKS AND THAT HAVE HIGH LEGAL CONTENT; DISPUTE SETTLEMENT, LEGAL STATUS OF THE ECONOMIC ZONE, AND INSTALLATIONS. THE FIRST IS PERHAPS OF GREATEST RELEVANCE TO THE MEETING. I HAVE ALSO ADDRESSED THE ISSUE OF MUTUAL ADJUSTMENT TO THE 200-MILE ZONE, WHICH SEEMS TO BOTHER THE CANADIANS A GREAT DEAL. HOWEVER, SINCE THE BOUNDARY PROBLEMS AND FISHERIES PROBLEMS WILL BE ADDRESSED AT OTHER MEETINGS, I WONDER HOW MUCH MIGHT COME OF THIS ITEM. I INCLUDE ALSO A CONTINGENCY ITEM ON THE EASTPORT, MAINE, PROBLEM, BUT LEAVE IT TO L/EUR TO DECIDE IF THERE IS REALLY ANY POINT IN RAISING IT. MY VIEW IS PROBABLY NOT. JOHN CROOK MIGHT HAVE A FEEL FOR THIS.

2. LOS TREATY - COMPULSORY DISPUTE SETTLEMENT (TALKING POINTS)
(BACKGROUND: THE EXTENT AND STRENGTH OF CANADIAN SUPPORT FOR
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COMPULSORY DISPUTE SETTLEMENT IN THE LOS CONFERENCE IS UNCLEAR,

DESPITE POSITIVE STATEMENTS.)

A. WE HAVE A VERY GOOD CHANCE OF DOING BETTER ON DISPUTE SETTLEMENT IN THE LOS TREATY THAN WE HAVE HAD IN BROAD MULTI-LATERAL TREATIES IN A LONG TIME. THE MODERATED SOVIET POSITIONS ARE ENCOURAGING.

B. IT SEEMS CLEAR THERE WILL BE BINDING THIRD PARTY SETTLEMENT WITH RESPECT TO THE DEEP SEABEDS. THIS IS NOT ENOUGH.

C. MANY OF US HAVE SERIOUS DOUBTS ABOUT THE UTILITY OF THE ECONOMIC ZONE COMPROMISE WITHOUT COMPULSORY BINDING SETTLEMENT. MOREOVER, IT IS IN OUR MUTUAL INTERESTS FOR A VARIETY OF REASONS.

(1) IT WILL BE VERY DIFFICULT TO HARMONIZE POSITIONS ON POLLUTION WITHOUT BINDING THIRD PARTY DISPUTE SETTLEMENT.

(2) THE CHANCES OF GETTING JAPANESE AND SOVIET ACCEPTANCE OF THE TREATY ARE PROBABLY GREATER IF IT CONTAINS DISPUTE SETTLEMENT ON FISHERIES ISSUES.

(3) IT IS THE BEST WAY TO MAINTAIN STABILITY IN THE LAW OF THE SEA WITHOUT CLOSING THE DOOR TO ADPTIONS TO CHANGING CONDITIONS.

D. WE REMAIN FLEXIBLE ON PROCEDURES, BUT BELIEVE THAT GIVING THE DEVELOPING COUNTRIES THE OPTION OF A NEW LAW OF THE SEA TRIBUNAL, AND THE EUROPEANS THE OPTION OF THE ICJ AND ARBITRATION, WILL PROBABLY BE NECESSARY IN THE END TO ACHIEVE MAXIMUM SUPPORT FOR COMPULSORY SETTLEMENT. WE DO BELIEVE, HOWEVER, THAT THE ICJ OR THE NEW TRIBUNAL SHOULD BE AVAILABLE FOR PROVISIONAL MEASURES (E.G., VESSEL RELEASE ON BOND) IN CASES WHERE ARBITIATION IS THE APPLICABLE PROCEDURE, BECAUSE TIME IS CRITICAL. ALSO, WE BELIEVE THERE SHOULD BE A SEPARATE STANDING TRIBUNAL FOR DEEP SEABEDS DISPUTES RELATING TO EXPLORATION AND EXPLOITATION ARRANGEMENTS WITH THE SEABED AUTHORITY. THE DISPUTE SETTLEMENT ARTICLES OF THE LOS CONVENTION WILL IN ANY EVENT LEAVE CANADA AND THE US WITH THE OPTION OF AGREEING ON BILATERAL PROCEDURES FOR THIRD PARTY SETTLEMENT IF WE SO CHOOSE. AN INTERESTING QUESTION IS WHETHER WE SHOULD LEAVE THIS FOR AD HOC DECISION, OR WHETHER IT WOULD BE BETTER TO AGREE IN ADVANCE ON THE PROCEDURES WE WILL USE - WITHOUT OF COURSE PRECLUDING AD HOC AGREEMENT ON OTHER PROCEDURES IN ANY EVENT.

E. WE HOPE THAT THE CANADIAN DELEGATION WILL NOT SUPPORT SUCH BROAD WORDING FOR AN EXCEPTION TO DISPUTE SETTLEMENT FOR COASTAL STATE RIGHTS AS TO UNDERMINE THE PRINCIPLE. (FOR CONFIDENTIAL

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L/OES: INCLUDE HERE US AMENDMENT TO ARTICLE 18, PARAS 1 AND 2(A) OF SNT, PART IV, WHICH CAN BE FOUND IN GROUP OF 5 CDS REPORT).

F. THE QUESTION OF PRIVATE PARTY ACCESS IS OF COURSE CONTROVERSIAL.

(1) THERE SEEMS TO BE BROAD SUPPORT FOR THE RIGHT OF A PRIVATE MINER TO SUE THE SEABED AUTHORITY. WE SUPPORT THIS; IT LIMITS THE CASE TO THE REAL PARTIES IN INTEREST.

(2) WE BELIEVE THAT VESSEL OWNERS SHOULD HAVE A

LIMITED RIGHT TO SUE FOR VESSEL RELEASE WHERE THE TREATY REQUIRES THIS, WITHOUT PREJUDICE TO THE MERITS OF THE CASE. THE PROBLEM HERE IS SPEED.

(3) OUR ENVIRONMENTALISTS ARE VERY INTERESTED IN FINDING MEANS FOR A PARTY OTHER THAN STATES TO BRING SUITS TO COMPEL COMPLIANCE WITH ENVIRONMENTAL AND CONSERVATION STANDARDS. IN PARTICULAR THEY ARE CONCERNED:

(A) THAT THE SEABED AUTHORITY WILL BE VERY ECONOMICALLY ORIENTED.

(B) THAT NO STATE WILL HAVE SUFFICIENT INTEREST TO SUE ANOTHER STATE OR THE AUTHORITY FOR POLLUTION THAT SLOWLY, BUT PERSISTENTLY, AFFECTS AMBIENT WATER QUALITY IN THE OCEANS.

(C) THAT LOCAL PRESSURES AND FOREIGN LICENSE FEES WILL ENTICE COASTAL STATES TO DISREGARD THEIR DUTY TO CONSERVE FISH STOCKS, PARTICULARLY STOCKS THAT ARE NECESSARY TO SUPPORT A FOOD CHAIN (E.G., FOR WHALES).

WE ARE NOT CERTAIN WHAT REALLY CAN BE DONE ON THE ISSUE GIVEN THE RELUCTANCE OF STATES TO BE SUED BY PRIVATE PARTIES OR PERHAPS EVEN INTERNATIONAL ORGANIZATIONS, AND ARE FEARFUL THAT PRESSING TOO HARD ON THE ISSUE COULD ENDANGER THE ENTIRE DISPUTE SETTLEMENT NEGOTIATION.

G. WE BELIEVE THE MILITARY EXCEPTION FROM THE DISPUTE SETTLEMENT PROVISIONS IS NECESSARY TO PREVENT POLITICIZED LITIGATION, TO HELP ATTRACT SOVIET SUPPORT, AND TO AVOID COMPLICATING NEGOTIATION OF THE SUBSTANTIVE ARTICLES.

3. LOS TREATY - LEGAL STATUS OF THE ECONOMIC ZONE (TALKING POINTS) (BACKGROUND: PRECISE CANADIAN POSITION UNCLEAR).

A. ARTICLE 73 OF THE COMMITTEE 2 TEXT EXCLUDES THE ECONOMIC ZONE FROM THE LEGAL DEFINITION OF THE HIGH SEAS. WE THINK THIS IS UNNECESSARY AND UNWISE.

B. INCLUDING THE ECONOMIC ZONE IN THE HIGH SEAS WOULD NOT PREJUDICE THE RIGHTS OF THE COASTAL STATE. THIS COULD BE EX-CONFIDENTIAL

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PRESSLY STATED. WE PROCEED ON THE ASSUMPTION THAT A MUTUALLY ACCEPTABLE SETTLEMENT ON VESSEL-SOURCE POLLUTION WILL BE INCLUDED IN THE TREATY, AND ALSO WOULD NOT BE PREJUDICED.

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ACTION L-03

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C O N F I D E N T I A L SECTION 2 OF 2 GENEVA 0537

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C. REASONS FOR ENSURING THE ECONOMIC ZONE IS HIGH SEAS:

(1) WE DECREASE THE RISK OF THE ECONOMIC ZONE EVOLVING INTO A TERRITORIAL SEA OR ITS EQUIVALENT. STATES ALSO CAN BETTER HANDLE DOMESTIC POLITICAL PRESSURES TO MAKE NEW ASSERTIONS OF JURISDICTION IN THE AREA.

(2) WE MAKE SURE WE PRESERVE THE LARGE BODY OF HIGH SEAS LAW THAT HAS EVOLVED OVER CENTURES AND THAT IS NOT INCOMPATIBLE WITH THE COASTAL STATE RIGHTS. COASTAL STATE SHIPS NAVIGATING IN THE ECONOMIC ZONE ARE PROTECTED BY THAT BODY OF LAW, NOT BY NEW COASTAL STATE RIGHTS.

(3) WE AVOID AMBIGUITIES IN EXISTING TREATIES. IN PARTICULAR, THE PROBLEM OF ARTICLE 12 OF THE ICAO CONVENTION IS VERY SERIOUS, SINCE EXCLUSIVE ICAO REGULATION IS EXPRESSLY TIED TO THE TERM "HIGH SEAS".

4. LOS TREATY - INSTALLATIONS IN THE ECONOMIC ZONE TALKING POINTS) (BACKGROUND: CANADA SEEMS REPEAT SEEMS TO INTERPRET CONTINENTAL SHELF CONVENTION AS GIVING IT JURISDICTION OVER ALL SEABED INSTALLATIONS RIGHT NOW, WHETHER OR NOT THEY ARE RESOURCE OR ECONOMIC IN CHARACTER.)

A. WE HAVE IMPORTANT MUTUAL SECURITY INTERESTS IN MAKING SURE THAT COASTAL STATE JURISDICTION OVER INSTALLATIONS IN THE ECONOMIC ZONE IS NOT SO BROAD AS TO IMPAIR IMPORTANT USES OF THE SEABED. THESE ARE NOT LIKELY TO INTERFERE WITH COASTAL STATE RIGHTS AND, IN ANY EVENT, MUST BY THEIR NATURE BE KEPT SECRET. WE REALIZE CANADA AND THE US HAVE SEEN THIS ISSUE SOMEWHAT CONFIDENTIAL

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DIFFERENTLY, BUT BELIEVE SNT ARTICLE 48 MORE THAN ACCOMODATES CANADIAN CONCERNS.

B. SNT ARTICLE 45 (1)(B) IMPLIES COMPLETE JURISDICTION OVER ALL INSTALLATIONS AND STRUCTURES. IT MUST BE AMENDED TO CONTAIN A GENERAL OR SPECIFIC CROSS-REFERENCE TO ARTICLE 48. THE

EVENSEN GROUP TEXT USED THE TERM "JURISDICTION AS PROVIDED FOR IN THIS CONVENTION".

C. SNT ARTICLE 48 1 (A) AND (B) INCLUDES ALL ARTIFICIAL ISLANDS, AND ALL INSTALLATIONS AND STRUCTURES USED FOR ANY ECONOMIC PURPOSE, UNDER EXCLUSIVE COASTAL STATE JURISDICTION. THERE IS A POSSIBLE AMBIGUITY IN THE CROSS-REFERENCE TO ARTICLE 45, BUT THIS IS A DRAFTING PROBLEM.

D. SNT ARTICLE 48 1(C) INCLUDES WITHIN COASTAL STATE JURISDICTION INSTALLATIONS AND STRUCTURES WHICH "MAY INTERFERE" WITH THE EXERCISE OF COASTAL STATE RIGHTS IN THE ZONE. THE PROBLEM IS THAT THE WORD "MAY" IS AMBIGUOUS, AND LEAVES OPEN A POSSIBLE INTERPRETATION THAT THE COASTAL STATE COULD PROHIBIT ALL INSTALLATIONS IN ADVANCE, SUBJECT TO A FINDING OF NO POTENTIAL INTERFERENCE. THIS OF COURSE WOULD AMOUNT, AT BEST, TO A NOTICE REQUIREMENT. ACCORDINGLY, WE WOULD LIKE TO SEE THE TEXT BALANCED, AND MADE OBJECTIVE BY DELETING THE WORD "MAY".

5. MUTUAL ADJUSTMENT TO 200-MILE ZONE (TALKING POINTS).

A. WE WILL FACE NUMEROUS BILATERAL ISSUES OF MANY KINDS RESULTING FROM THE EVENTUAL EXTENSION OF JURISDICTION. THESE WILL TO A GREATER OR LESSER DEGREE BE INTER-RELATED. MOST WILL CONCERN FISHERIES.

B. IT IS IMPORTANT THAT LAWYERS ON BOTH SIDES WATCH THE DEVELOPMENTS CLOSELY, AS IN EFFECT WE WILL HAVE TO BUILD A PATTERN OF NEW RULES AND, IT MAY BE EASIER IF SOME OF THESE ARE BASED ON EXISTING PRINCIPLES.

C. AMONG THE ISSUES WE WILL FACE ARE:

(1) MARITIME BOUNDARIES.

(2) CONSERVATION AND MANAGEMENT OF SINGLE FISH STOCKS THAT MIGRATE OFF BOTH OUR COASTS.

(3) RECIPROCAL FISHING PRIVILEGES, AND THE RELATIONSHIP OF THESE PRIVILEGES TO THIRD-STATE ACCESS TO FISHERIES.

(4) COOPERATION IN THE EXERCISE OF SUCH ENVIRONMENTAL AND SCIENTIFIC RESEARCH RIGHTS AS WE MAY HAVE IN THE TREATY.

(5) MEANS FOR HANDLING OUR ENVIRONMENTAL DUTIES TO EACH OTHER UNDER AN LOS TREATY.

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OTHER UNDER AN LOS TREATY.

D. ALL OF THESE ARE PRACTICAL PROBLEMS THAT ARE BEST HANDLED IF WE CAN AVOID FIRM AND DIFFERING LEGAL POSITIONS OF PRINCIPLE. IF THIS IS NOT POSSIBLE, THE MAGNITUDE OF THE PROBLEMS MAY NECESSITATE LATER DISCUSSION ON THE QUESTION OF DISPUTE SETTLEMENT.

6. SUBJECT: EASTPORT, MAINE.

A. BACKGROUND: PLANS HAVE BEEN MADE FOR THE CONSTRUCTION OF PORT AND REFINERY FACILITIES OF EASTPORT-MAINE, FOR RECEIVING LARGE TANKERS. THE CHANNEL INTO EASTPORT RUNS THROUGH CANADIAN WATERS. CANADA HAS OBJECTED TO THE PASSAGE OF LARGE TANKERS

IN THE AREA ON SAFETY AND ENVIRONMENTAL GROUNDS. FORMER CANADIAN ENVIRONMENT MINISTER DAVIS INTIMATED IN A PUBLIC STATEMENT THAT THE CANADIAN POSITION WOULD ENCOURAGE THE CONSTRUCTION OF A REFINERY IN CANADA. THE STATE OF MAINE HAS MADE IT CONSTRUCTION PERMITS DEPENDENT ON THE COMPANIES' OBTAINING CANADIAN CONCURRENCE. THIS HAS IN EFFECT GIVEN US A MEANS OF AVOIDING THE ISSUE, ALTHOUGH WE COULD INSIST THAT CANADIAN CONCURRENCE IS UNNECESSARY AS A MATTER OF INTERNATIONAL LAW IF WE SO DESIRED. NEVERTHELESS, AS A BORDER STATE, MAINE COULD MAINTAIN THAT ITS DESIRE FOR CANADIAN CONCURRENCE IS BASED ON STATE POLICY, E.G., INSURING MUTUAL COOPERATION AND RESTRAINT ON ENVIRONMENTAL MATTERS IRRESPECTIVE OF LEGAL REQUIREMENTS.

B. ANTICIPATED CANADIAN POSITION: EITHER THE CANADIAN WATERS ARE INTERNAL, AND THERE IS NO RIGHT OF INNOCENT PASSAGE, OR EVEN IF TERRITORIAL WATERS, INNOCENT PASSAGE IS SUBJECT TO CANADIAN ENVIRONMENTAL REGULATION. THE WATERS ARE NOT A STRAIT USED FOR INTERNATIONAL NAVIGATION IN WHICH INNOCENT PASSAGE CAN- NOT BE SUSPENDED. EVEN IF THEY WERE, CANADA IS REGULATING, NOT SUSPENDING, PASSAGE.

C. SUGGESTED US POSITION: THE CANADIAN WATERS ARE TERRIT- ORIAL, AND MEET THE GEOGRAPHIC TEST OF A STRAIT CONNECTING THE HIGH SEAS TO THE TERRITORIAL SEA OF A FOREIGN STATE (USA). MOREOVER, INITIATION OF A PATTERN OF INTERFERENCE WITH ACCESS TO AND FROM EACH OTHER'S PORTS WOULD BE A VERY UNDESIRABLE PRECEDENT. THE RIGHT TO REGULATE INNOCENT PASSAGE IS SUBJECT TO THE RULE THAT IT CANNOT BE HAMPERED; IT IS NOT REASONABLE IN THIS CASE TO COMPLETELY ELIMINATE INNOCENT PASS- AGE FOR AN ENTIRE CLASS OF VESSELS.DALE

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